

***United States Court of Appeals
for the Second Circuit***

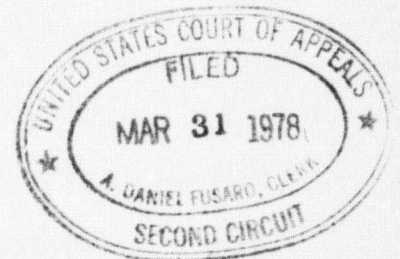


**PETITION FOR
REHEARING
EN BANC**

ORIGINAL

77-6148,6154

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT



DU PONT GLOBE FORGAN INCORPORATED, *et al.*,
Plaintiffs-Appellants,

—against—

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Defendants and Third-Party
Plaintiffs-Appellees-Appellants,

—against—

UNITED STATES OF AMERICA,
Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING EN BANC
OF PLAINTIFFS-APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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:
DUPONT GLORE FORGAN INCORPORATED,
et al., :

Plaintiffs-Appellants, :

- against - :

Docket Nos. 77-6148
77-6154

AMERICAN TELEPHONE AND TELEGRAPH
COMPANY, et al., :

Defendants-Appellees
and Third-Party Plain-
tiffs-Appellants, :

- against - :

UNITED STATES OF AMERICA, :

Third-Party Defendant-
Appellee. :

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PETITION FOR REHEARING EN BANC
OF PLAINTIFFS-APPELLANTS

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Appellee.	:	

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PETITION FOR REHEARING EN BANC
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Preliminary Statement

By any measure, this is a major case involving questions of exceptional importance. The plaintiff class consists of about 1,000 of the nation's largest companies, who subscribe to defendants' Centrex telephone service. Defendants, the American Telephone and Telegraph Company and its 23 affiliated operating companies, comprise the Bell System -- the largest private economic enterprise in the world. At issue are important and difficult questions -- erroneously decided below -- concerning the application of Section 1 of the Sherman Act as well as the interpretation and application of the Excise Tax Reduction Act of 1965, 79 Stat. 136 ("Reduction Act").

The gravamen of plaintiffs' complaint was that the Bell System defendants acting in concert -- in pursuit of their own interests -- fixed and bundled Centrex charges to plaintiffs for a period of six or more years so as to deny plaintiffs the benefits of the discrete reduction in excise taxes plainly contemplated by the Reduction Act. As a direct and inevitable consequence of such concerted action, plaintiffs were compelled to pay more than \$30 million in excise taxes of which they would otherwise have been relieved.

The court below and the parties have recognized the magnitude of these issues and interests. Following a six-day trial held in the fourth year of active litigation, Judge Weinfeld wrote an 88-page opinion dismissing the complaint,¹ his third published opinion in this action. On this appeal, the plaintiffs and the defendants -- with leave of this Court -- filed oversized briefs, analyzing in detail the factual and legal issues presented. The six volumes of exhibits and appendices filed with the Court ran some 3,400 pages. Considerable efforts were devoted to the preparation of this appeal -- indeed, the briefs collectively listed ten attorneys.

1. duPont Glove Forgan, Inc. v. American Telephone and Telegraph Co., 69 F.R.D. 481 (S.D.N.Y. 1975); 428 F. Supp. 1297 (S.D.N.Y. 1977); 437 F. Supp. 1104 (S.D.N.Y. 1977). The judgment of this Court discussed below affirmed the second and third decisions; the first (certifying the class) was not appealed. The second opinion dismissed three counts of plaintiffs' complaint as well as the third-party complaint prior to trial, upon motions for summary judgment. Because of the limitations of space, we do not discuss the questions determined in this second decision, but continue to rely on the analysis set out in our briefs of the errors below. We address only the issues tried before the lower court, which form the basis of its third opinion.

Against these important interests and complex issues,²
a panel of this Court (Mulligan and Gewin, C.J.J., and Miller,³
D.J.) summarily affirmed the judgment of dismissal within days
of the oral argument, adopting in toto the opinions below without
treating the many issues raised by the parties on appeal.

The lower court's opinion greatly expands the burden
of proof imposed on plaintiffs in this Circuit to establish
conspiracy, and virtually erases the established requirement
that defendants come forward with evidence that they acted
independently to rebut the inferences that would otherwise flow
from their consciously parallel conduct, uniform adoption of a
scheme developed among themselves and close coordination of its
implementation. Plaintiffs are, thus, effectively required to
provide direct proof of actual agreement to an illegal scheme.
This is not the law of the land and should not become the law
in this Circuit. See Norfolk Monument Co. v. Woodlawn Memorial
Gardens, Inc., 394 U.S. 700, 704 (1969); Interstate Circuit,
Inc. v. United States, 306 U.S. 208, 226 (1939).

Moreover, the lower court's decision severely con-
stricts the scope of Section 1 of the Sherman Act. Only an
express agreement as to the level of prices would satisfy the

2. Senior Circuit Judge, Fifth Circuit Court of Appeals.

3. Associate Judge, United States Court of Customs and Patent
Appeals.

test imposed below, even though agreements affecting prices have been condemned as illegal. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940). Similarly, the lower court -- even though holding that these affiliated defendants are legally capable of conspiracy -- effectively immunized them from liability because they are not horizontal competitors. This is a palpably wrong result. See Mailand v. Burckle, 1978-1 CCH Trade Cases ¶61,818 at 73,408-73,409 (Sup. Ct., Cal. 1978); cf. Albrecht v. Herald Co., 390 U.S. 145 (1968).

Further, in applying the Reduction Act, the lower court sanctioned an unguided exercise of the taxing power by these defendants. This Court should impose upon defendants a duty to act reasonably commensurate with the power they exercised, see Steele v. Louisville & Nashville R.R., 323 U.S. 192, 202 (1944), and should reaffirm that statutes are to be interpreted to avoid issues of constitutionality. See National Ass'n of Independent Television Producers and Distributors v. F.C.C., 516 F.2d 526 (2d Cir. 1975).

Plaintiffs respectfully petition the eight other active members of this Court to join Judge Mulligan for a rehearing en banc. The opinion below, even if lengthy and even if authored by Judge Weinfeld, should not be shielded from full consideration upon the expansive briefs and appendix filed with

⁴
this Court.

Statement of Facts

The essential facts of which plaintiffs complain form a simple pattern. In 1965, Congress enacted the Reduction Act, which, inter alia, created an exemption from the federal communications excise tax imposed on local telephone service for "private communication service." The Act, however, conditioned this exemption with the requirement that "a separate charge" be made for such "private communication service." At the time of the Reduction Act's passage, Centrex charges were "packaged"; there was a basic monthly per station rate which did not separately state the charge for "private communication." Accordingly, the Reduction Act's exemption did not at once apply to Centrex service. A "separate charge" had to be established for "private communication service."

4. This case is most appropriate for meaningful appellate review because it is essentially a "paper" case. Plaintiffs called no witnesses but relied on documents and depositions; defendants called only four witnesses, who testified briefly. There were 1,755 pages of trial exhibits (E1-E1755). Of the 1,652 page appendix, only 311 consist of live trial testimony (1166a-1477a); 111 pages (412a-523a) are taken up by stipulations, and 546 by the presentation of plaintiffs' paper case (585a-1125a, 1478a-1484a).

5. Centrex, in essence, is a form of telephone service, providing both "exchange access," that is, the capability of making telephone calls outside a subscriber's own premises to the general telephone exchange network (local and long-distance calls), and "private communication," that is, the capability of calling different extensions within one subscriber's system.

But defendants did not separate Centrex charges upon the Reduction Act's passage in 1965; not until late 1971 and 1972 did a single one of the 23 operating companies separate Centrex charges; then, in rapid succession, they all did. Plaintiffs were, accordingly, denied the benefit of the Reduction Act's exemption for six years and paid an excessive amount of tax -- estimated for the class to be at least \$30 million.

Plaintiffs commenced this action in June, 1973. The case went to trial in May, 1977 on two claims. First, plaintiffs alleged that the failure of each of the 23 operating companies to effect the separate Centrex charges for six years was not coincidental, but, rather, was the result of an agreement among themselves and AT&T to maintain a uniform Centrex rate structure throughout the Bell System, in violation of Section 1 of the Sherman Act. Second, plaintiffs argued that defendants were required pursuant to and as a result of the Reduction Act to separate Centrex charges within a reasonable time.

The lower court rejected our contentions following the trial. We now address the errors made by the lower court and ignored by the panel's memorandum judgment in this Court.

The Antitrust Issues

A. Conspiracy.

This appeal squarely presents the question of whether any amount of evidence, short of proof of actual agreement, can

establish a conspiracy under Section 1 of the Sherman Act. Ignoring proof that all but established actual agreement, Judge Weinfeld concluded that the defendants did not conspire and that their striking, unexplained and otherwise inexplicable parallel conduct pursued over six years resulted from independent decisions made by each of the 23 operating companies. His opinion, if adopted as the law of this Circuit, places an almost insurmountable burden upon all antitrust plaintiffs.

In reaching his conclusion, Judge Weinfeld misapplied the general tests for civil antitrust conspiracy. See Theatre Enterprises Inc. v. Paramount Film Distributing Corp., 201 F.2d 306, 309-10 (4th Cir. 1953), aff'd, 346 U.S. 537 (1954); Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036 (2d Cir.), cert. denied, 429 U.S. 885 (1976); Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co., 513 F.2d 102, 111 (2d Cir. 1975). The evidence before the lower court -- as reflected in its own findings of fact -- showed prolonged collaboration, meetings, coercion by AT&T and resulting parallel action over many years on complex matters. Moreover, the clear evidence -- again incorporated into the Court's own findings -- established close links and constant communications among the defendants on the very issue of Centrex rate structure.

These facts, and many others all found by the Court, created an all but conclusive inference of conspiracy:

- The defendants are all part of the Bell System, and their very interrelationships create a propensity for agreement. AT&T owns all of the stock of 16 of the companies, at least 85% of the stock of 5 others, and a minority interest in the stock of the other 2 companies. Beyond stock ownership, there are a myriad of contractual and historic ties that bind the Bell System, including inter-company transfers of personnel, constant communications and conferences, and systemwide task forces (106a-107a).⁶ Consequently, as the lower court found, "AT&T's advice is usually followed by the operating companies, with variations to account for local situations" (107a).
- In late 1964, as AT&T's lobbyists pushed for the Reduction Act, AT&T's rate officials considered whether Centrex rates should be separated in order to obtain the exemption provided for "private communication" service in AT&T's draft bill. AT&T's officials decided no separation should be made (141a-142a), because of their concern that such action would stimulate regulatory review (147a-148a).
- Following the passage of the Act, AT&T repeatedly informed the operating companies of its position that no separation should be made (142a-143a). There were memoranda sent to each company (E979-E1112), conferences attended by representatives of each company, (142a), and discussions between AT&T and particular operating companies (143a). Between 1965 and 1971, each operating company -- in keeping with AT&T's unequivocal position -- maintained the package rate (163a).
- From time to time in those years, customers complained to certain operating companies and asked that Centrex charges be separated. In each case, the operating company consulted with AT&T's rate officials, and was advised that AT&T's position remained unchanged. In each case, the customer's request was then denied in letters reviewed, revised and cleared by AT&T. (143a).

6. References are to the appendix ("107a") and exhibit ("E1374-E1392") volumes filed with this Court.

- By 1971, competition was emerging in the telephone industry, as a result of a decision by the Federal Communications Commission permitting non-Bell equipment to be interconnected into the telephone network. Use of the Carterfone Device in Message Toll Telephone Service, 13 F.C.C. 420 (1968). Defendants' ability to meet competition to their Centrex service was hampered by the excise taxes collected on it (150a-151a). Accordingly, AT&T at long last decided that Centrex charges should be separated to reduce the price charged to customers (150a).
- In September 1971, AT&T sent a memorandum to each operating company, providing a methodology for separating Centrex rates (E1374-E1392). Within fourteen months, all companies had completed the separation.

In the face of such evidence showing that defendants moved only in lockstep, the lower court should have found a conspiracy, unless the defendants could come forward with evidence of independent action; at that point, the burden of proof shifted. See Michelman v. Clark-Schwebel Fiber Glass Corp., supra; Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co., supra. But defendants offered no evidence at all that prior to 1971 any defendant operating company independently considered whether to separate Centrex rates. No officer or employee of any defendant operating company testified as to why his company did not separate prior to 1971. Nevertheless, the lower court held that each defendant acted independently. It excused all contrary evidence on the ground that meetings, consultations and ongoing relationships were part and parcel of the Bell System structure -- thereby effectively immunizing

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from antitrust liability any long-standing agreement to agree.

The lower court's conclusion, when all the evidence is weighed, was tantamount to a requirement of direct proof of an actual agreement. The trial court's error in not finding conspiracy probably stems from the fact that it found nothing wrong in what defendants joined to do. The opinion treats "conspiracy" itself as nefarious matter. But the question of agreement, combination or conspiracy is -- as the lower court noted early in its opinion (121a), but then ignored -- a separate issue from whether its aim is legal, per se illegal or

7. The lower court relied on evidence supposedly reflecting independent judgment on related issues (162a-164a). For example, the lower court noted that one witness, Arthur X. Ichter, testified that in 1971 he independently decided that two operating companies should file revised tariffs before he learned that AT&T was considering the same step. But Mr. Ichter made no "independent" decision that bound any operating company. He had no such power. His contemporaneous memorandum states that he "obtained clearance [from AT&T] to file our proposed Centrex revisions in Delaware promptly" and was advised that "AT&T will recommend basically the same sort of Centrex restructuring Systemwide" (E1361). This "clearance" and "advice" was absolutely critical for Mr. Ichter's corporate superior, who wrote:

"[AT&T] is moving ahead with a letter recommending Systemwide conversion to the two-rate approach. Their letter should be circulated prior to our filing date in Delaware. Accordingly, they will be committed to this rate plan and see no need for delaying a Pennsylvania filing" (E1363) (emphasis supplied).

The message in this document is unmistakable: none of the operating companies would act before AT&T was "committed" to the change "systemwide" and none would act if AT&T saw any need for delay.

illegal because unreasonable. This Court must find an agreement of conspiracy here. The next question is whether that conspiracy restrained trade.

B. Restraint of Trade.

The lower court held that, even if defendants had conspired, that conspiracy would not be in restraint of trade. This determination raised several important legal issues which merit determination by the Judges of this Court.

Defendants' primary legal defense -- which is implicit in the lower court's factual analysis, although not expressly set forth in its statement of legal principles -- was that there cannot be a price fixing violation by entities in "horizontal" market positions, if they are not direct competitors. We submit this Court should once and for all specifically reject this assertion. See Albrecht v. Herald Co., supra; United Mine Workers v. Pennington, 381 U.S. 657, 663 (1965). The California Supreme Court -- applying federal precedents to its state statute -- rejected this very proposition as recently as January 1978. Mailand v. Burckle, supra.

Defendants also contended, and were supported by the lower court, that any agreement concerning the Centrex rate structure would not constitute price fixing. However,

the Supreme Court has made no requirement that a conspiracy set specific prices or even set prices directly. See United States v. Container Corp. of America, 393 U.S. 333, 334-35 (1969); United States v. General Motors Corp., 384 U.S. 127, 147-49 (1966); United States v. Socony-Vacuum Oil Co., *supra*, 310 U.S. at 222-24. The question is whether the activity involved had the purpose or "the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity ***." United States v. Socony-Vacuum Oil Co., *supra*, 310 U.S. at 223; see also United States v. Container Corp. of America, *supra*; United States v. General Motors Corp., *supra*; National Macaroni Mfrs. Ass'n. v. F.T.C., 345 F.2d 421 (7th Cir. 1965).

Here, the evidence marshalled by plaintiffs from defendants' own documents, depositions and testimony established an agreement intended to protect Centrex rates and rate structure from regulatory review and revision. From the outset, Centrex was designed to provide defendants with a hidden price increase on existing equipment without the regulatory hearings that are required where increases are sought for existing services (137a); new services, like Centrex, can be implemented more easily, without opening this regulatory "can of worms" (1256a). Further, similarity of Centrex rates and structure was a constant refrain, drilled into the operating companies by AT&T, because the large multistate customers targeted for this

service would quickly question any sharp discrepancies in the rates or service provided to their installations in different states by different operating companies (141a). Thus, action by any one company to separate would have led customers served by that company and others to demand separation in other jurisdictions. Defendants had to move in tandem.

Defendants therefore sought to avoid taking any action that might provoke review and possible revision of the rates. Unbundling would have led to scrutiny by state rate commissions that could have tampered with their prices. By not unbundling they stabilized -- fixed -- prices, albeit within a range rather than at a single level. The substantial consequences to plaintiffs were predictable and foreseen. The price they paid for Centrex service was inflated by at least \$30 million, representing the amount of excessive federal excise taxes levied on these services -- an amount which concededly would not have been due if defendants had not agreed and conspired to maintain the uniform Centrex rate structure. Defendants' stabilized prices; that is illegal.

Breach of Duty Claim

Judge Weinfeld held that the Reduction Act imposed no duty on defendants to separate Centrex charges within a reasonable time of the Act's passage. He did not, however,

state with whom the power to determine when plaintiffs were to benefit from the Act's exemption rested. As a result, he sanctioned an exercise of multiple powers by defendants, who (i) lobbied for the Act's passage in 1964-65; (ii) decided in 1964-1971 not to effect a separation; (iii) collected from plaintiffs between 1966-1971 federal excise taxes on the entire Centrex charge; and (iv) decided to separate in 1971, and thereby lowered the amount paid by plaintiffs as well as the tax received by the Government. At all times, the initiative rested with the defendants.

We submit that the Reduction Act required that the Bell System defendants establish a separate charge for Centrex service within a reasonable time after the Congress passed it. For this Court to adopt any other interpretation, it would have to find that Congress intended to give self-interested defendants unguided power to control (i) whether the United States Government would or would not receive many millions of dollars in excise taxes, and (ii) whether the plaintiffs would or would not have to pay those many millions of dollars. But that was not Congress' intent. The obvious expectation of the Congress, and, therefore, its intent, was that Centrex charges would be unbundled in short order and that plaintiffs would be left with these dollars.

To read the statute as giving defendants an unrestricted license on when and if to tax their customers does more than batter Congressional intent. It presents the very serious constitutional question of an unguided and, therefore, improper delegation of the taxing power. The Supreme Court and this Court have told us how to avoid the constitutional issue when the question is one of improper delegation: a requirement of reasonable standards. See Steele v. Louisville & Nashville R.R., supra; National Ass'n of Independent Television Producers and Distributors v. F.C.C., supra. This Court should hold that the Bell System defendants had a duty to unbundle Centrex charges with reasonable speed, and give plaintiffs redress for its breach by defendants.

Conclusion

For the reasons stated, we respectfully request that this Court grant plaintiffs a rehearing en banc.

New York, New York
March 31, 1978

Respectfully submitted,

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STATE OF NEW YORK,
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Norman Friedman , being duly sworn, deposes
and says, that on the 31st day of March 19 78, ~~XXXXXXXXXX~~

~~XX~~ he served the annexed Petition for Rehearing en Banc of Plaintiffs-
Appellants, in re: Dupont Glore Forgan Inc., et al v. American Tel.
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upon See Second Page

Esq(s), Attorney(s)

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Sworn to before me this 31st

day of March

19 78

Norman Friedman

John Alusick

Notary Public in New York
No. 31-4002133
Qualified in New York County
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